Supreme Court, U.S.
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No. 98-834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Petitioners,

—v.—

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners Planned Parenthood of the Blue Ridge, *et al.*, respectfully submit the following reply brief in support of the petition for certiorari.

ARGUMENT

1. The Respondent ("the state") points to a claimed concession regarding the need for further factual development by counsel for the Petitioners at oral argument before the court below. The quoted portion of the argument, however, only shows that counsel conceded what must be conceded: that the court of appeals has the *authority* to reach the merits on an appeal from a preliminary injunction. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986). The transcript of the argument shows quite clearly that counsel for Petitioners did *not* believe that to be an appropriate course of action for the court of appeals if its merits ruling would involve a holding that notice statutes, as a matter of law, require no judicial bypass for mature minors.[1]

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[1] Although the transcript of the oral argument is somewhat garbled, it nevertheless establishes that counsel believed further factual development would be required depending on the holding reached. The section of the transcript immediately preceding the portion of the argument quoted by the state reads as follows:

> THE COURT: Do you need any evidence?
>
> MR. HELLER: I think. [sic]
>
> THE COURT: I think is [sic] what Judge Niemeyer is getting at, or at least is my question. Do we have to have any facts?
>
> MR. HELLER: That would depend in part on whether this court determines that parental notice statutes requires [sic] a Bellotti type bypass or doesn't or require something between Bellotti type bypass and no bypass at all. The thing is where this court finds on that.

Oral Argument Transcript at 40 (4th Cir. Mar. 3, 1998).

2. The decision below is *not* based on two "independent grounds," as the State claims. *See* Opp. Br. at 8.[2] On the contrary, the second "independent ground" -- that the word "may" is mandatory in the Act -- is *entirely* dependent on a holding *opposite* that reached by the court below.

The holding of the court below is, as correctly described by the State, that "a statute requiring notice to a non-abusive, non-absent parent need not include a bypass for the mature minor in order to pass constitutional muster." *Id.* at 8-9. The "independent ground" asserted by the State is that "if parental notice and consent statutes *were* governed by the same constitutional requirements, the Act would meet those requirements." *Id.* at 9 (emphasis in original). The claim that this is an "independent ground," however, puts the cart before the horse. The court below held, at great length, that notice and consent statutes are *not* governed by the same constitutional requirements. Any holding that the Act "can reasonably be interpreted to include a mandatory maturity bypass," A-67, would not be reached unless the opposite holding -- the one mandated by this Court's precedents -- were *first* reached. Because the court of appeals held that notice statutes do not require a mandatory maturity bypass, the *dicta* that the Act could be construed to contain such a bypass is rendered meaningless. The proper course of action, then, is summary vacature of the decision of the court below with instruction to determine whether the Act indeed may be interpreted to comport with the bypass requirements established in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*").[3]

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[2] Citations to the Brief in Opposition are given in the form "Opp. Br. at __"; to the Petition, in the form "Pet. __"; and to the Appendix to the Petition, in the form "A-__." Section 16.1-241(V) of the Virginia Code is referred to below as "the Act."

[3] As Petitioners have already argued, such a construction, if rendered by a federal court, flies in the face of the construction given the Act by the Virginia Supreme Court's administrative arm, and therefore violates

In other words, the state's "independent ground" is not truly independent because it leads to a different result; a truly independent ground supporting a judgment leads to the same result. The result of a holding that the Act passes constitutional muster because it contains a mandatory bypass for mature minors is that such a bypass must be implemented. In direct contrast, the result of the holding below is that such a mandatory bypass need not, and indeed should not, be implemented, because none is required by the Constitution. Absent re-affirmation by this Court that mature minors are entitled to obtain an abortion without parental involvement, the proposed construction that "may" is mandatory will remain an intangible potentiality for minors in Virginia. Only a holding by this Court that a mature minor is entitled to a bypass could lead to a mandatory construction of "may," if indeed such a construction is possible. *See* n.3 *supra*.

3. The State's argument utterly rejects any meaningful status for minors found mature under the Act's bypass. Indeed, the status of "maturity" is entirely irrelevant, in the state's view, to the minor's privacy right to decide on her own to obtain an abortion; for even if she is found mature, a variety of other "legitimate state interests . . . plainly are not satisfied . . . " Opp. Br. at 17.[4] What role, then, does the

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principles of federalism and comity. *See* Pet. at 8 n.8. Petitioners do not argue, as the State claims, *see* Opp. Br. at 7 n.7, that the court below should have certified the construction of the Act to the Virginia Supreme Court, for the Act has already been construed by the responsible state agency. Rather, Petitioners argue that a *rejection* of the construction adopted by that agency may only be achieved by resort to a pronouncement of the Virginia Supreme Court itself, and not by a federal court. Federalism is as much violated by a federal court construction of a state statute that saves the statute, if that construction would be rejected by the state supreme court, as it is by a construction that condemns a statute.

[4] Nor is there any evidence that any of the State's litany of interests would be served by denial of a judicial bypass to a mature minor. Indeed,

finding of maturity play in the Virginia statute? Under the state's view, it is merely an irrelevancy that not only *may* but *should* be disregarded by state judges hearing bypass requests, in order to further a host of state interests the state contends remain legitimate even in the case of a mature minor.[5] This chain of reasoning stands in direct conflict with Justice Powell's opinion in *Bellotti II*, under which a State is prohibited from notifying the parents of a minor found to be mature of her intention to obtain an abortion. *Id.*, 443 U.S. at 647 (opinion of Powell, J.).

4. Moreover, the State's theory of the judicial bypass runs contrary to the function of the maturity evaluation. A finding that a minor is mature enough to make an informed decision to abort on her own is, simply put, a "partial emancipation" of the minor -- partial insofar as it is limited to the question of whether the minor is capable of deciding on her own whether to obtain an abortion.[6] Just as the state has disavowed an interest in compelling parental involvement in the case of a completely emancipated minor -- such as one who has joined the United States Armed Forces or one who has ever entered into a valid marriage, A-107 -- so too the state has no interest in compelling parental involvement in the decision of a minor found by a judge to be "mature and capable of giving informed consent to the proposed

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elsewhere the State appears to concede this lack of fit by writing that the Act does not require minors "even to consult with" their parents, but only requires notice. Opp. Br. at 13. Surely mere notice without consultation cannot serve any of the interests the state claims are legitimate in the case of a mature minor.

[5] Three of the five examples of state interests asserted to be legitimate in the case of a mature minor seem actually to collapse into one interest: assistance with post-abortion care. *See* Opp. Br. at 17-18.

[6] Virginia law recognizes that "[e]mancipation of a minor may be express or implied, partial or complete. . . . Partial emancipation frees the child for only a part of the period of minority, or from only part of the parents' rights, or for some special purpose . . ." *Brumfield v. Brumfield*, 74 S.E.2d 170, 173 (Va. 1953).

abortion." A-105. The state offers no reasonable explanation for why the state's asserted interests in compelling notice to the parents of a minor found mature by a state judge are not also present in the case of a minor who is on active duty in the military.[7] Absent such an explanation, the requirement of notice in the case of a minor partially emancipated by a finding of maturity is entirely unreasonable. Just as the unreasonableness of Minnesota's two-parent notice requirement was confirmed by the lack of such requirements in other state consent provisions for minors, *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990), the Virginia law's arbitrary discrimination between categories of partially emancipated (i.e., mature) and completely emancipated minors is further confirmation of its unreasonableness. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("unique and puzzling regulatory framework" of beer labeling statute confirms its irrationality).[8]

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[7] The state explicitly concedes, for example, that "[c]onsiderations of family integrity . . . continue to be important through the date of her emancipation, *whether by age or otherwise*." Opp. Br. at 18 (emphasis added). The state fails to explain why its interest in promoting family integrity persists in the case of a minor as to whom a state judge has made a particularized assessment of sufficient maturity to make the abortion decision in an informed manner, but evaporates in the case of a minor on active duty in the military.

[8] This argument is only strengthened by the state's observation that the Act actually creates broader categories of per se emancipation than does the Virginia statute governing emancipation of minors generally. *See* Opp. Br. at 5. There are thus three categories of emancipated minors under the Virginia law: (1) those who are emancipated for all purposes under the Virginia statute governing emancipation generally by such events as enrollment in the military; (2) those who meet the *Act's* definition of emancipation, but would not meet the general statute's definition; and (3) those found mature by a state judge. There is no rational explanation for the state to preserve its power to mandate parental notice for minors in category (3) while disavowing that power utterly for minors in categories (1) and (2). Indeed, if anything, it appears that the minors in category (3) should be entitled to proceed without

5. In addition, a maturity finding under the Act and under the decision of the court below does not entitle the minor to anything: she may well be left in the same position she was in before she requested a bypass. Viewed in this light, the bypass proceeding is transformed into a purely arbitrary burden for the mature minor. No other judicial process -- let alone one involving time-sensitive constitutional rights -- imposes this type of Kafkaesque result on litigants. Under the Virginia law, mature minors simply do not know what rule of law -- if any -- will determine whether they are granted a bypass or not. *See generally* LON L. FULLER, THE MORALITY OF LAW 34-35 (1964) (one way to "fail to make law" is to keep secret the rules for deciding cases).

6. The state asserts anew that there is an independent parental "right to know" about the mature minor's abortion, and that it is a "distort[ion]" of "the teaching of *Hodgson*" to deny the existence of such a right. *See* Opp. Br. at 21 & n.17. But this Court in *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976), held: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to become pregnant." The court below holds that an independent interest, yea an independent *right*, of the parent to know about the mature minor's abortion outweighs the mature minor's privacy right to obtain an abortion in consultation only with her physician. That decision is thus in conflict with *Danforth*.

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notice, because they have been found partially emancipated for the purpose of making the abortion decision itself, while, of course, enrollment in the military or a prior marriage involves no particularized assessment of the minor's capacity to make the abortion decision.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

Respectfully submitted,

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